IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

CIVIL WRIT No. 1333 of 2006

GUNWANTI DEVI
V/S
DISTRICT JUDGE,PALI & ORS.

Mr. KR SARAN for Mr. SAJJAN SINGH, for the appellant / petitioner

Mr. VIJAY BISHNOI & Mr. HR SONI, A.G.A., for the respondent

Date of Order : 6.9.2007

HON'BLE SHRI N P GUPTA,J.

ORDER

The matter came up before me for consideration of early hearing application on 29.8.2007. However on that day the learned counsel for the parties sought time, with a prayer, that on the adjourned date they would argue the matter finally. Today, accordingly the matter was finally heard, though the matter comes up for consideration of application for early hearing, in view of the peculiar circumstances, viz. that the impugned order has been passed in the election petition, directing inspection of 72 votes, which were found invalid by the counting officer, and vide order dt. 7.3.2006 the operation of that order had been stayed.

By the impugned order Annexure-10, the learned trial court, after completion of the trial of the election petition, passed the order dt. 28.2.2006. The election petition was filed, seeking to challenge the election of Sarpanch of villge Kalabkalan, which was held on 31.1.2005, on the ground, that the election petitioner had secured more votes, but the returning officer, in collusion with the returned candidate, counted the votes of the election petitioner at a deflated figure, and information was not given to the election agent, as to in which bundle how many ballots had been put, and thus the votes secured by the election petitioner were shown to be less. Likewise, it was also alleged as a ground, that 72 ballots were rejected, while many of them were valid, still they were illegally rejected, and the invalid votes polled in favour of returned candidate were also included in the polled ballots of the returned candidate, and she was declared elected. It was also pleaded, that request was made for recounting, which was turned down. Various other grounds were also given. Learned trial court framed two issues, out of which relevant is issue no. 1 being, as to whether the counting of votes in the election was not held in accordance with law. Then, the learned trial court discussed the evidence led on behalf of the parties, and held that so far wrong placing of ballots in the bundles is concerned, there is no clear evidence about it, and therefore, such vague and unreliable evidence cannot be considered to hold that there

was any illegality or irregularity in the placement of ballots, or in preparing bundles, and proceeded to believe the statement of N.A.W. 1 Majahir Sultan, that no such irregularity was committed. Then, the learned trial court proceeded to consider the aspect of 72 ballots, which were declared to be invalid, and held, that according to Rule 49 (5) it is the responsibility of the authority concerned to give appropriate opportunity to the candidate to inspect the ballot papers being rejected, and according to Rule 50 (3) brief reasons should be given for rejection, while N.A.W. 1 Majahir Sultan has not deposed, that he had shown invalid ballots to the candidate, but has deposed that he had told the candidate as to why each ballot is being rejected. Then, it has also been held that it has also not been deposed, that the reasons were recorded on the ballot, as to why the particular ballot is being rejected. With this it has been concluded, that the ballots were not shown to the candidate, and reasons for rejection was not mentioned on each ballot. With this the learned trial court has proceeded to observe, that it is a question of fact as to whether the reasons for rejection of ballots were given or not, or as to whether they were rightly rejected, or not, and since this cannot be decided without inspecting the 72 ballots, which have been declared invalid, and the ballots being the best evidence, it is open to the Court, to itself satisfy by looking at the ballots itself, and observed that the Court has such powers under Rule 85 and

86 of the Rules, and directed the ballots to be called for inspection of the Court only.

It is against this order, that the present writ petition has been filed. It is contended, that there is absolutely no evidence on record, to show either that the ballots being rejected were not shown to the concerned candidate, nor is there any evidence to show that the reasons for rejection of each ballot was not mentioned on the rejected ballot. May be that the difference of votes between the election petitioner and the returned candidate is very meagre, but then in the absence of requisite circumstance, being placed on record, and proved, such order of inspection could not be given. It was also contended, that even Rule 85 and 86 does not authorise the learned trial court to pass this type of order.

Learned counsel for the respondent, on the other hand, read to me the statement of N.A.W. 1 Majahir Sultan, to show, that he has not deposed that the ballots which had been rejected were shown to the respective candidate, nor has he deposed about having endorsed the reasons on each ballot paper, and therefore, the learned trial court was perfectly right in passing the impugned order. Learned counsel relied upon the judgments of Hon'ble the Supreme Court, in V.S. Achuthanandan Vs. P.J. Francis, reported in (2001) 3 SCC-81, specially para-13, wherein it has been

held that in the peculiar facts of a given case the court may exercise its power to permit a sample inspection to lend further assurance to the prima facie satisfaction of the court regarding the truth of the allegations made in support of a prayer for recount and not for the purpose of fishing out materials. Learned counsel also relied upon another judgment of Hon'ble Supreme Court, in Chanda Singh Vs. Shir Ram Varma, reported in AIR 1975 SC-403, specially para-6 thereof, wherein it has been held, that where the difference is microscopic, the stage is set for a recount, given some plus point of clear suspicion or legal lacuna militating against the regularity, accuracy impartiality or objectivity bearing on the original counting.

I have considered the submissions, and have gone through the impugned order, and the other material placed on record.

So far the legal principles propounded in the two judgments is concerned, there is no dispute about legal proposition as such, and so far the judgment in Chanda Singh's case is concerned, it clearly holds, that where the difference is microscopic the stage is set for a recount, ***"given some plus point of clear suspicion or legal lacuna....."***. In the present case, the difference can be said to be microscopic, but then the question is, as to whether the other *plus point of clear suspicion or legal*

lacuna has been brought on record. Likewise, in V.S. Achuthanandan's case Hon'ble the Supreme Court held, that in the peculiar facts of a given case the court may exercise its power to permit a sample inspection ***"to lend further assurance to the prima facie satisfaction of the court regarding the truth of the allegations made in support of a prayer for re-count..."***. In the present case it can immediately be observed, that a bare look at the order Annexure-10 does show, that neither of these circumstances have been found by the learned trial court to exist. Of course, at page-8 of the impugned order it has been observed, that according to rules, the candidates should be given opportunity to inspect the invalid ballots, and the reason for rejection should be endorsed on the reverse side of the ballot, which is not found to have been done. Suffice it to say, that learned counsel for the respondent election petitioner was pointedly and repeatedly asked to point out the material available on record, on the basis of which this conclusion could possibly be arrived at, and the learned counsel, despite all his best efforts, could show none. In this back ground, even in the affidavit of the election petitioner, filed by way of evidence, in support of election petition, it has not been averred, that the ballots being rejected were not shown to the candidate, or his election agent, nor has it been deposed, that reasons for rejection of ballots was not endorsed on the ballots, rather the stock ground given is, that various

ballot papers polled in favour of the election petitioner were rejected, and various invalid votes were counted in favour of the returned candidate. Likewise Om Prakash, the election agent of Rekha Devi, in his affidavit given in support of the election petition has not done anything better; than the evidence of Bahadur Singh, who is the election agent of the election petitioner, also shows that he too has not deposed anything on the above aspects. In this background, even N.A.W. 1 has not deposed, that rejected ballot papers were not shown to the returned candidate, or his agent, nor has he deposed, that reasons for rejection of ballot papers were not endorsed on the ballot papers being rejected.

In the circumstances, a further look at the impugned order, specially para-11 shows, that rather learned trial court was finding the evidence available on record to be deficit, and it was for the purpose of satisfying itself, that it wanted to inspect the rejected ballots, and not for the purpose of *"lending further assurance to the prima facie satisfaction of the Court regarding truth of the allegation made in support of a prayer for recount..".*

So far as Rule 85 and 86 is concerned, in my view, in the circumstances of the case, they are also of no help to the respondent.

Thus, taken from any stand point, I do not find the impugned part of the order to be sustainable, and am left with no option but to set aside it.

Accordingly, the writ petition is allowed. The impugned order is set aside, and the learned trial court is directed to decide the election petition on merits, on the basis of the material already available on record, and expeditiously. It is made clear, that whatever observations have been made by this Court, regarding the evidence available on record, shall not prejudice the learned trial court in deciding the election petition on its own merits, and the learned trial court will decide the election petition dispassionately and objectively.

(N P GUPTA),J.

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